In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1432

DIRECT MAIL ADVERTISING ASSOCIATION, INC., ET AL., PETITIONERS

v.

UNITED STATES POSTAL SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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1. Petitioners are two associations of third-class mail users and two corporations that make substantial use of third-class mail service. They seek review of a decision of the court of appeals construing certain provisions of the Postal Reorganization Act of 1970, 39 U.S.C. 101, *et seq.* The specific issue presented concerns the power of the Postal Service to make temporary postage rate increases pending a

decision on permanent increases by the Postal Rate Commission and the Postal Service Governors. See generally 39 U.S.C. 3621-3625.

Petitioners contend here (Pet. 9), as they did below, that the requirement in Section 3626 of Subchapter II of the Act[1] that permanent increases in the postage rates of certain classes of mail, including the regular-rate third-class mail involved here, must be phased-in over a five or ten year period in annual installments as nearly equal as practicable, also applies to the temporary rate increases Congress authorized in Section 3641, which is part of Subchapter III—"TEMPORARY RATES AND CLASSES." In rejecting this contention and, instead, giving effect to what it termed the "common sense interpretation of the language of the statute" (Pet. App. B, 9b-10b), the court of appeals based its interpretation on the central purpose of the Act: the "plac[ing] [of] the Postal Service on a self-sufficient basis" (Pet. App. B, 11b).

2. The holding of the court of appeals—that phasing does not apply to temporary rate changes, and "that Congress relied on the restrictions it imposed on temporary rates in section 3641(c), as being the exclusive limitations it intended to apply to the imposition of temporary rates" (Pet. App. B, 10b)—is correct and further review is not warranted. Congress expressly indicated the monetary limitations applicable to temporary, as opposed to permanent, rate

[1] Subchapter II (Sections 3621-3628) is entitled PERMANENT RATES AND CLASSES OF MAIL.

increases. In Section 3641(c), those limitations are set forth in the following terms:

> A rate of postage for a class of mail or a fee for a postal service under a temporary change under this section may not exceed the lesser of (1) the rate or fee requested for such class or service, or (2) a rate or fee which is more than one-third greater than the permanent rate or fee in effect for that class or service at the time a permanent change in the rate or fee of such class or service is requested under section 3622 of this title.

Petitioners misconstrue this provision when they argue (Pet. 9) that "since Section 3626 requires phasing of permanent rates, the Postal Service's 'request' for permanent rate increases must as a matter of law involve a request for phased rates * * * [and] therefore the phasing requirement limits temporary as well as permanent rates." As the court of appeals noted (Pet. App. B, 9b, n. 12), "the rate *requested* is not a phased rate" (emphasis in original), but rather, the full permanent rate. Moreover, as the statute shows, Congress intended that, within the limits prescribed by Section 3641(c), the Postal Service management should have the means to obtain expeditiously revenue to meet the service's fiscal needs while formal revenue-producing procedures (*i.e.*, the permanent rate proceedings) are pending.

Petitioners suggest the possibility of abuse and disruption in connection with temporary rate-making (Pet. 17). But, as the court of appeals pointed out,

"Congress did consider the problem of the impact of temporary rates on users, and acted to insure that they did not have an unduly disruptive effect by limiting them to the lesser of the full requested rate or a one-third increase" (Pet. App. B, 10b). There is no basis in the Act or its legislative history to go beyond this express treatment of the problem by applying the phasing requirement of Subchapter III to the temporary rates. The rates involved here are within the only monetary limitations Congress has prescribed for temporary rates,[2] and until such time as a new permanent rate structure is approved and introduced, the Postal Service retains the right to operate on the basis of those rates.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1972.

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[2] For example, with respect to regular-bulk third-class mail, the current permanent rate is 22 cents per pound, the full permanent rate requested is 28 cents per pound, and the temporary rate at issue here is 28 cents per pound (Pet. App. B, 7b).

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